IN THE

COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

(Civ.# B 025 920)
(Superior Court # C 420 153)

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Plaintiff-Appellant,

and

MARY SUE HUBBARD,

Intervenor-Plaintiff-Appellant,

-against-

GERALD ARMSTRONG,

Defendant-Respondent.

ON APPEAL FROM SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
JUDGE PAUL G. BRECKENRIDGE, JR.

RESPONDENT'S BRIEF

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INTRODUCTION

This appeal is from a case of conversion. In 1982, being threatened by plaintiff/appellant organization, to which he had previously belonged, defendant/respondent obtained through his relationship with a writer who had been contracted to write a biography of the organization's founder and owner, documents belonging to and concerning the owner, and sent them to his attorneys who were already involved in litigation against plaintiff organization and its owner.

In 1984, after a six week trial, the court below issued its Statement of Decision finding that defendant, Gerald Armstrong, was justified in doing what he did and ruling against plaintiff organization, the Church of Scientology of California, and plaintiff-in-intervention, Mary Sue Hubbard, wife of L. Ron Hubbard, the founder and owner. Appellants seek reversal of that judgment and nominal damages, arguing that there was no justification for the tort of conversion and that even if there was, defendant was not justified in doing what he did.

This court has before it two appellants' opening briefs in this case. The first brief was filed on August 25, 1985. Defendant, Gerald Armstrong filed a respondent's brief in the first appeal on January 27, 1986. The facts of the case, the procedural history in the Court below and the central issues in both appellants' briefs are identical; respondent, therefore, adopts by reference, incorporates herein and joins his earlier respondent's brief. That brief was competently prepared by

respondent's then attorney who had represented him throughout the litigation and who was present each day of the trial.

This Court dismissed the first appeal on December 18, 1986 on the ground that there would be no appealable final judgment until after trial of defendant's cross-complaint which had been severed from the underlying case in June 1983. The parties had, in the meantime, on December 11, 1986, settled the cross-complaint. Pursuant to the settlement agreement, the documents which defendant had sent to his attorneys, and which had remained with the clerk of the lower court throughout the litigation (hereinafter referred to as the "subject documents") were delivered to a third party related organization, the Church of Scientology International (CSI). Additionally, all the trial exhibits, either admitted into evidence or marked for identification only, were delivered to CSI. This Court, at the time of its consideration of the first appeal, asked for and received a number of trial exhibits from the court below, and these, too, were delivered to CSI when this Court returned them to the lower court upon the dismissal of that appeal.

On February 24, 1987, following their removal of the subject documents and the trial exhibits from the lower court's possession, appellants filed a new notice of appeal from the lower court's decision. Appellants filed their opening brief in this second appeal on December 29, 1989. By waiting so long to file this second appeal and by creating a seriously incomplete record, appellants have put respondent at a significant

disadvantage and made it impossible for this court to review the case, since neither respondent nor any court has the trial exhibits. Appellants' appeal should be dismissed.

ADDITIONAL PROCEEDINGS IN THIS CASE

On February 29, 1989, respondent filed in this court a document entitled "Respondent's Petition For Permission To File Response and For an Extension of Time To File Response", (Respondent's Supplemental Appendix 1-3; hereinafter R. Supp. App.) which this court granted on March 9, 1990. Respondent appended to his petition as an exhibit a document entitled "Mutual Release of All Claims and Settlement Agreement", (R. Supp. App. 4-19), (hereinafter referred to as the "settlement agreement"). Respondent petitioned this court to be able to respond because the settlement agreement he had signed, which allowed appellants to maintain their original appeal after the settlement of the cross-complaint, also required respondent to "waive... any rights he may have to oppose (by responding brief or any other means) any further appeals taken by the Church of Scientology of California." (R. Supp. App. 7,8).

This court also has before it at this time another appeal in this case entitled "Church of Scientology of California and Mary Sue Hubbard, Appellants, against Gerald Armstrong, Defendant, Bent Corydon, Appellee, Case No. B038975". Respondent herein respectfully requests that this court take judicial notice of the documents filed in that appeal. Mr. Corydon, who is a defendant

or a plaintiff in a number of cases involving appellant organization, moved the trial court to unseal the Armstrong court file, which had been sealed by order of the trial court at the time of the settlement of the cross-complaint pursuant to stipulation between the parties. Corydon's motion was granted and the court's file was opened to the public. The order was later modified to permit only Corydon and his attorneys to view and copy the file. Appellants in that matter seek to have the Armstrong court file resealed. On March 1, 1990, respondent filed a petition in that appeal similar to his petition in this appeal asking the court for permission to file a responsive document. As of the date of filing this respondent's brief, the court has not ruled on his petition.

ARGUMENT

I

CRUCIAL EVIDENCE IS MISSING FROM THE RECORD

With regard to this appeal, every argument made by appellants and every response thereto turns on the large body of evidence presented at trial. As pointed out above, that mass of documentary evidence is now exclusively in the hands of appellants and\or their third party representatives. Many of those documents were the subject documents to which appellants claimed the right of ownership and\or control. In addition to the subject documents which were the center of controversy in this litigation, many documents came from the private files of

respondent and from the files of witnesses and third parties and were not within the stated claims of appellants. Every document, regardless of its nature, which was received by the court as evidence or simply marked for identification has been turned over to appellants' third party representative on or about December 12, 1986 as a result of the settlement of the cross-complaint and a subsequent stipulation executed by the parties and approved by court order on December 11, 1986 (Appellants' Supplemental Appendix 2).

II

UNLESS TRIAL COURT'S DISCRETION IS ABUSED, DECISION SHOULD REMAIN WHAT IT IS

Apart from the legal arguments presented by respondent in his brief of January 27, 1986, there are other legal and equitable arguments which evolve from the fact that there is no longer a reviewable record. There is only one independent entity that has had the opportunity to view and consider all the evidence presented and that is the trial judge. Appellants make much of the trial judge's alleged abuse of discretion. However, in both procedural and substantive law, a trial judge has the discretionary power to decide the issues. In those situations his exercise of discretion will not be disturbed unless it is abused; i.e., the appellate court will not substitute its own view as to the proper decision.

"The showing on appeal is wholly insufficient if it

> presents a state of facts, a consideration of which, for the purpose of judicial action, merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge. To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice." Brown v. Newby (1940) 39 C.A.2d 615, 618, 103 P.2d 1018.

The principal situations in which the trial judge exercises discretion are in the field of procedure. Appellants' arguments regarding the trial judge's alleged improper admission and\or use of evidence have no meaning without the reviewing court being able to review that very same evidence which is the subject of the appellants' appeal.

III

CONFLICTS IN EVIDENCE SHOULD BE RESOLVED IN FAVOR OF FINDINGS OF TRIAL COURT

The major thrust of appellants' argument is that myriad documents relied upon by respondent for his defense either had no relevance to respondent's claims and/or were given improper weight and application by the trial judge. It is well settled that where the evidence is in conflict, the appellate court will not disturb the verdict of the jury or the findings of the trial court. The presumption being in favor of the judgment, the court must consider the evidence in the light most favorable to the prevailing party, giving him the benefit of every reasonable inference, and resolving conflicts in support of the judgment.

The exposition in Crawford v. Southern Pac. Co. (1935) 3 C.2d 427, 429, 45 P.2d 183, is typical:

> "In reviewing the evidence on such an appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict, if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

The rule is identical where the trial is by the court:

> "In examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in this court, to be resolved in favor of the finding" Bancroft-Whitney Co. v. McHugh (1913) 166 C. 140, 142, 134 P. 1157.

Appellants' brief is replete with challenges to the credibility of witnesses and the relevancy, character and use of the documentary evidence. Both lines of challenge are poorly taken. As one court tells us:

> "With rhythmic regularity it is necessary for us to say that where the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is any

> substantial evidence to support them; that we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. No one seems to listen." Overton v. Vita-Food Corp. (1949) 94 C.A.2d 367, 370, 210 P.2d 757; Buckhantz v. Hamilton & Co., 71 C.A.2d 779.

It is patently unfair and obnoxious to normal standards of justice and fair play that appellants, after having retrieved from the trial court and securing each and every document entered into evidence or marked for identification, now be allowed to challenge the findings of the trial court while retaining all the material necessary for this court to properly determine "whether there is any substantial evidence to support" the trial court's findings.

IV

JUDGE'S OPINION IS NOT THE DECISION, AND NEITHER HIS CONCLUSIONS NOR HIS REASONING FURNISH ANY BASIS FOR ATTACK ON THE OTHERWISE CORRECT STATEMENT OF DECISION.

Appellants argue in their brief at page 62 that:

> "The decision below has been invoked against the Church by litigants throughout the country to support allegations similar to those contained in dicta in the memorandum of decision, even though, as we have shown in Point I, supra, the dicta were based upon 'evidence' admitted solely to show Armstrong's state of mind, and not for its truth. The most unfair and dramatic example of this was the trial court's unqualified 'diagnosis' of Mr. Hubbard and the Church itself as paranoid and schizophrenic...The plaintiffs preserved their right to appeal from the judgment and decision below precisely to counter the continuing adverse consequences the decision and judgment continue to have on their privacy, property, and other rights."

Appellants do not like the trial court's opinion which was based upon the evidence presented at trial. Before the filing of the instant appeal, appellants entered into the settlement agreement whereby all the documents relied upon by this respondent for his defense were turned over to appellants' third party choice, The Church of Scientology International (R. Supp. App. 11-13) **and** according to the terms of that agreement, this respondent was required to refrain from responding to any such appeal (R. Supp. App. 7,8). Thus, by removing that evidence upon which respondent relied for his defense and by removing respondent, appellants' chances for a successful appellate challenge were greatly increased, even though such actions constituted a fraud upon this court specifically and an insult to justice generally.

Appellants have received all the documents which were the subject of the complaint below. Appellants, by their own admission, seek one dollar only in monetary damages. Appellants are before this court because they do not like the "dicta" in the trial court's Statement of Decision. This is not a valid reason. "Sometimes the trial court's expression of its reasons for a ruling or decision goes beyond a simple statement of grounds or legal conclusions, and is embodied in an opinion, discussing the facts and law in the manner of an appellate court opinion. It has already been pointed out that such an opinion is not the decision, and **neither its conclusions nor its reasoning furnish**

any basis for attack on the otherwise correct findings..." (emphasis added) 9 Witkin, Cal. Procedure (3d Ed. 1985) Appeal Section 263 at 270.

V

DIFFICULTY PREPARING RESPONSE BECAUSE OF LACK OF DOCUMENTS

The documents which were the subject of the complaint and which were reclaimed by appellants before the filing of their brief were inextricably related to respondent's defenses to appellants' allegations not only at the trial but also in this appeal, and to the arguments and characterizations made by appellants; e.g., "Confidential documents", "Invasion of privacy", "Extremely private documents", "Deeply private and highly valuable documents", "Intrusion upon seclusion", "Trial court's abuse of discretion". Indeed, appellants cite to Exhibits no less than thirteen times. (Appellants' Brief, pages 9, 10, 13, 14, 15, & 26). Respondent's disadvantage is not only the inability to, himself, cite to those very documents which the trial court used to determine the validity of his defense, but also to meaningfully respond to appellants' contrary and unilateral use of those same documents out of context.

Appellants also make much of that aspect of the trial court's Statement of Decision which pleases them: the finding that certain prima facie elements of appellants' case were established. In civil litigation, the prima facie standard is commonly used by courts to shift the burden of proof from one

party to the other. United States v. Zolin, (1989) ___U.S.___, 109 S.Ct. 2619 ,n.7. The burden having shifted to respondent and respondent relying upon the evidence presented at trial, convinced the court that his actions were justified.

The evidence relied upon by respondent and used by the trial court in forming its Statement of Decision is forever gone. It is forever gone only because of the acts of Appellants in making certain that such would be the case. Appellants should be denied any relief whatsoever given the decimated state of the record they now challenge.

CONCLUSION

For the reasons discussed above and in respondent's brief dated January 27, 1986, respondent respectfully requests that this appeal be dismissed with prejudice or in the alternative that judgment of the trial court be affirmed.

Dated: July 9, 1990

Respectfully submitted,

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Attorney for Respondent

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

I am a resident of the county of Marin; I am over the age of eighteen years and not a party to the within entitled action; my business address is 707 Fawn Drive, Sleepy Hollow, California 94960.

On July 9, 1990, I served the within RESPONDENT'S BRIEF and RESPONDENT'S SUPPLEMENTAL APPENDIX on the interested parties by placing a true copy thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail at Berkeley, California addressed as follows:

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Clerk of the Superior Court
County of Los Angeles
111 North Hill St.
Room 204
Los Angeles, CA 90012

Executed on July 9, 1990 at Berkeley, California.

I declare under penalty of perjury that the foregoing is true and correct.

Bambi Sparks

BAMBI SPARKS